

RECOMMENDATIONS FOR THE IMPLEMENTATION OF A JUST COMPENSATION PLAN TO ADDRESS BREAUX ACT OYSTER LEASE ISSUES

by the Chairman, Breaux Act Oyster Lease Ad Hoc Committee

March 10, 2003



Introduction

The “Breux Act” (Coastal Wetlands Planning, Protection and Restoration Act) Task Force (“Task Force”) has long recognized the need for an equitable method of clearing projects of potentially impacted oyster leases. Nevertheless, the lack of procedures for the payment of just compensation to lease holders has made implementation problematic. Therefore, at their July 6, 2000 meeting, the Task Force established the Oyster Lease Ad Hoc Committee for assisting the state in the development of regulations for this purpose.

Background

Overall, the single most important existing law pertaining to oyster leasing in Louisiana is R.S. 56:427-428, which provides DWF (the Louisiana Department of Wildlife and Fisheries) its authority to lease areas of state water bottoms for the purpose of oyster cultivation. Several areas of this legislation have recently been amended to reduce conflicts between the oyster industry and coastal restoration efforts. These amendments include language allowing the Secretary of DWF to renew leases for a shortened period (a “bob-tailed lease”--from 1 to 14 years). It also provides for the lessee to retain an “operational” lease in a coastal restoration project area if the lessee can show that the lease is productive and agrees to sign a new lease including a hold-harmless clause.

One of the State’s first important instruments to address the issue of conflicts between oyster leasing and coastal restoration was the Memorandum of Agreement (MOA) between DNR and DWF, which went into effect on June 1, 1996. That agreement provides a means for coordination between the establishment of coastal restoration project areas and oyster leasing. Following this major step forward, the main piece of legislation concerning the State’s basic authority to establish a relocation program was passed during the regular session of 1997, R.S. 56:432.1. Among other things, this law stipulates that **the provisions of this act be subordinate in all respects to regulations promulgated by DNR to “implement federal plans, programs, and requirements...”**

During this same time frame, it became clear that oyster leases potentially impacted by the Davis Pond project needed to be addressed. DNR promulgated regulations for an oyster lease relocation program specifically for the Davis Pond Diversion Project as of July 2000. Three supporting elements made these regulations possible: R.S. 56:432.1, the MOA referred to above, and a special act of Congress (Section 365 of WRDA 1996). Fortunately, all leaseholders in the project’s oyster impact area voluntarily agreed to participate in the program and signed hold-harmless statements in exchange for compensation. This was a unique situation and, as such, does not afford a mechanism for Breux Act projects to address oyster lease issues. However, this situation did illustrate that effective resolution is possible.

Most recently, during the regular legislative session of 2001, Acts 438 and 439 were passed, which provide for a grid system to track oyster productivity across coastal Louisiana, and improved procedures for the “Restricted Area Map,” respectively.

The Breaux Act Oyster Lease Ad Hoc Committee & Related Activities

The Breaux Act Program has evolved considerably since its inception in 1990. One example is the manner in which it has addressed oyster leases. During the development of the Priority Project Lists (PPL) 1 through 8, oyster conflicts within authorized project boundaries were assessed by DNR and sponsoring federal agency biologists, using information provided by project managers. Beginning with PPL 9, the Task Force has contracted with an oyster biologist as a member of the Environmental Working Group (EnvWG) to assess potential impacts to leases located within candidate project boundaries. This biologist prepares a report to the chairman of the EnvWG for incorporation into project budgets.

However, a decade after inception, the Breaux Act Program was still without a standardized valuation procedure for oyster leases. This meant that projects with potential impacts to oyster leases had no defined way to move past this issue. In response to this, the Task Force established the Breaux Act Oyster Lease Ad Hoc Committee in July of 2000. This group has met several times to assist DNR in developing acceptable regulations to address oyster lease issues: 8/28/00, 9/25/00, 11/29/00, 9/5/01, and 11/7/01. Several smaller working groups have also met to address specific issues: 1/8/02, 2/20/02, 3/27/02, and 2/27/03. The major issues under consideration by the group are reflected in the several iterations of draft regulations prepared by DNR: 5/6/01, 8/1/01, 9/19/01, 11/6/01, 11/8/02, 12/13/02, and 3/7/03; and in the agency responses to these (available upon request).

There has also been significant coordination with the Louisiana Oyster Task Force (LOTF) during the development of these draft regulations. Briefings on the draft regulations were held with oyster industry leaders on 6/27/02, and 9/16/02. A joint meeting of the Breaux Act Oyster Lease Ad Hoc Committee was held with the LOTF on 8/15/02 to discuss issues related to the May 6th draft of the regulations. Secretary Jack Caldwell presented the November 8th draft oyster regulations to the LOTF on 12/4/02, at which time a subcommittee was formed to review and submit comments back to the DNR Secretary. This subcommittee met twice in February of 2003.

Recommendations for the Implementation of a Just Compensation Plan to Address Breaux Act Oyster Lease Issues

A comparison of projected future coastal land loss with the locations of oyster leases makes clear the need to develop an equitable approach to implement a just compensation plan for oyster leases that would be adversely affected by CWPPRA projects. The proposed draft regulations (Attachment 1) would provide for an effective and standardized means to accomplish this. The resulting program would be executed in accordance with certain legislatively established deadlines, as illustrated in Schedule A (attached).

Given that the attached draft regulations are subject to modifications during the Administrative Procedures Act (APA) Process, it is understood that the Task Force may at some future point wish to revisit this issue. Nevertheless, because of the state's requirement under R.S. 56:432.1 to ensure that such regulations be subordinate to federal plans, programs, and requirements, it is necessary that DNR receive a positive indication from the Task Force prior to undertaking the APA process. In view of the valuable collaborative input of the Breaux Act agency representatives and others, most notably Secretary Jack Caldwell, and in response to the Task Force's charge of July 6, 2000, the Chairman of the Breaux Act Oyster Lease Act Ad Hoc Committee does respectfully recommend that the following motion be adopted by the Task Force*:

The Breaux Act Task Force acknowledges receipt of the March 10th, 2003 report prepared by the Chairman of the Breaux Act Oyster Lease Ad Hoc Committee, and the draft regulations contained therein. The Task Force acknowledges that DNR has promulgated these draft regulations in accordance with La.R.S. 56:432.1, paragraph E.

The Breaux Act Task Force recognizes that project-specific Cost Share Agreements and federal law and regulations set forth the procedures for crediting DNR for the real estate interests that DNR provides to the project including oyster leases.

* This motion was adopted by unanimous vote of the Task Force on April 16, 2003.

Schedule “A”

DRAFT Oyster Lease Relocation Procedures

- I. Preliminary assessment of oyster impacts are to be identified no earlier than during “Phase Zero” of the CWPPRA project selection process.
- II. Upon or after preliminary assessment of a proposed project’s oyster impacts, the La. Department of Natural Resources (DNR) will present the impact area to the La. Oyster Task Force (LOTF) by August 15th each year.
- III. Final recommendations as warranted by information not reasonably available prior to August 15th shall be given to the La. Department of Wildlife and Fisheries (DWF) and the LOTF prior to September 30th of each year.
- IV. The LOTF may request review by the House and Senate Committees on Natural Resources of the final recommendations presented by DNR. This request for review shall be submitted by the LOTF, in writing, to the committees no later than October 5th with a copy forwarded to the Secretary of the DNR. Failure of the LOTF to submit a request by October 5th shall be deemed acceptance of the final recommendations of the DNR. If a timely request for review has been submitted, the Committees shall meet prior to October 30th to review the recommendations which were delineated in the request for review. The committees may vote to approve the recommendations, disapprove the recommendations, or suggest changes in the recommendations. Failure to conduct a hearing or to make a determination relative to a recommendation by October 30th shall be deemed to be approval of that recommendation. For any recommendation which is disapproved of for which changes are suggested prior to October 30th, the DNR shall present to the LOTF and DWF, no later than November 5th, a revised final recommendation that reflects the action taken by the legislative committees (per Act 439, 2001, regular Session).
- V. Upon identification of the CWPPRA oyster impact areas, the DNR shall provide notice to DWF of said lease areas by November 1st of each year for inclusion on the “Restricted Area Map.” DNR will assist DWF in providing notification of same to lessees (as provided by the Memorandum of Agreement between DNR and DWF of June 1st, 1996).
- VI. Expiring leases in the project impact area will be subject to the “bobtailing” procedures outlined in R.S. 56:428.1.A. The intent of the selected renewal term will be that bobtailed leases will be in their last year when relocation costs are determined, and that leases are cleared prior to potential damage by construction or project operation.

- VII. Applications for new leases in project impact areas will be denied.
- VIII. During Phase One for CWPPRA, the oyster lease impact estimate will be refined as appropriate. This will normally be completed during the advanced planning stage that represents at least a 30% design completion. If and when there is sufficient technical information generated that indicates that an adjustment in the delineated impact area is appropriate, such as hydrologic modeling or more advanced project plans, then the new project boundaries shall be incorporated into the “Restricted Area Map” using the procedures above, beginning at step number two.
- IX. By the 95% design review stage, or as soon as possible thereafter, an oyster lease acquisition plan will be developed according to the program adopted by the CWPPRA Task Force. Actual payments associated with lease acquisitions will not occur, at the earliest, until the project has obtained Phase Two approval.

Time Line for Schedule A	
mid-May	CWPPRA Phase “0” candidates selected
by Aug 15	DNR presents first draft of Restricted Area Map (RAM) additions and changes to the LOTF
Before Sept 30	DNR presents final draft of RAM to the LOTF
by Oct 5	LOTF may, at its discretion, request a review of RAM by House and Senate Natural Resources Committees
Before Oct 30th	House and Senate Natural Resources Committees meet if a request by LOTF is received timely to approve, disapprove, or suggest changes to RAM. Failure to meet is deemed as approval.
by Nov 1	DNR provide DWF notice of leases affected by RAM
by Nov 5	DNR to present to LOTF and DWF the revised RAM, if changes are required by House and Senate Natural Resources Committees
effective Dec 31	expiring leases affected by RAM are bobtailed or, in rare instances, non-renewed
Jan	CWPPRA Task Force approves CWPPRA projects for phase 1
March/April	Phase 1 CWPPRA projects included in State’s Coastal Wetlands Conservation and Restoration Plan

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March 7th, 2003 @ 9:08 AM

CWPPRA OYSTER REGULATIONS

Subchapter C. CWPPRA Oyster Lease Acquisition Program

§876. Purpose

A. These special rules are adopted pursuant to LA R.S. 56:432.1 to provide for the acquisition of oyster leases within the projected impact area of a coastal restoration project. These rules supercede the provisions of Subchapter B insofar as Subchapter B may otherwise apply to oyster leases included within the scope of these rules.

B. Pursuant to LA R.S. 56:432.1E, these rules are adopted and intended to implement federal plans, programs and requirements of the task force established by CWPPRA, and shall be so interpreted.

§877. Definitions

Department—the Louisiana Department of Natural Resources, its secretary, or the secretary's designee.

DWF—the Louisiana Department of Wildlife and Fisheries, its secretary, or the secretary's designee.

Projected Impact Area—the projected impact area of a coastal restoration project included within a public program officially proposed by the appropriate local, state or federal agency, as determined pursuant to LA.R.S.56:428.1.

Affected Lease—a current oyster lease or a portion thereof identified by the Department from records maintained by DWF or from other information and determined by the Department to be located in whole or in part within a projected impact area.

Leaseholder—the lessee of an oyster lease granted by DWF pursuant to LA R.S.56:425 et seq, as appears on records provided by and maintained by DWF.

CWPPRA—the Coastal Wetlands Planning Protection and Restoration Act, Public Law 101-646, as amended.

Lead Agency—the lead agency designated by the task force to be the federal sponsoring agency for a CWPPRA project or program.

Task Force—the task force established pursuant to CWPPRA.

Secretary—secretary of DNR or the secretary's designee.

Closing Date—The date of execution of the purchase agreement and payment of the purchase price.

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§878. Implementation of Acquisition Program

A. The secretary, in consultation with the lead agency, will delineate the projected impact area of a CWPPRA project. The delineation may be changed as additional information becomes available.

B. The secretary shall make a reasonable effort to provide notice of the project-specific acquisition program to all leaseholders of affected leases.

C. The notice to leaseholders shall include at least the following:

1. A description and map of the projected impact area.
2. A copy of these regulations.
3. A statement informing the leaseholder of the state's intention to purchase the affected lease on a voluntary basis pursuant to these regulations.
4. A request that the leaseholder submit specific documentary and other information relevant to a determination of a purchase price for the subject affected lease in accordance with these regulations.
5. A response form to be completed and returned to the Department, which form shall provide information confirming the leaseholder's mailing address and the intention of the leaseholder to participate in the voluntary acquisition program or not, subject to the leaseholder's right to decline any offered purchase price. The form shall include an authorization granting the Department and its contractors the right to enter the affected lease for the purpose of surveying and making an assessment of the affected lease.

§879. Appraisal

A. The just compensation to be offered to the leaseholder of an affected lease shall be determined by an appraiser selected by the secretary.

B. Just compensation to the leaseholder for acquisition of the lease shall be an amount equal to the fair market value of the affected lease plus the fair market value of any marketable and seed oysters not reasonably removable from the affected lease within the time allowed, all as determined by the appraiser according to the procedure hereinafter provided.

C. Estimate of fair market value of affected lease

1. The appraiser shall estimate the fair market value of the affected lease by taking into account comparable sales of other leases, if sufficient reliable information is available to the appraiser to make such estimate according to accepted appraisal methods.
2. Alternatively, or in conjunction with lease sale data, the appraiser may estimate the fair market value of the affected lease by calculating the present value of estimated future net income from the lease during the remainder of the current lease term, beginning with the next succeeding full calendar year, in the following manner:

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- a. Estimated future production expenses shall be deducted from estimated future gross income from the affected lease to determine estimated future net income, all on an annual basis, then discounted to present value in accordance with Subsection D.
- b. Future gross income from the affected lease may be estimated by the appraiser based on adequate reliable documentation submitted by the leaseholder, such as sales records, income tax returns, and production reports. In the absence of such documentation, or in conjunction therewith, the appraiser may use whatever information may be available from other sources, both public and private, to estimate the average productivity of oyster reefs in the area of the affected lease on a sacks of marketable oysters per reef acre basis, and the market price thereof, then apply such estimate to the reef area of the affected lease.
- c. Future production expenses applicable to the affected lease may be estimated by the appraiser based on adequate reliable documentation submitted by the leaseholder, such as accounting records, invoices, cancelled checks, payroll records, third party records, income tax returns, and reports. Allowable expenses chargeable to the affected lease shall include labor (including a salary allowance for the owner), fuel, maintenance and repairs, supplies, rent, vessel and equipment depreciation, insurance and any other items of costs determined by the appraiser to be applicable to the affected lease according to accepted appraisal methods. In the absence of documentation submitted by the leaseholder, or in conjunction therewith, the appraiser may use whatever information may be available from other sources, both public and private, to estimate the average production expenses, present and future, of oyster reefs in the area of the affected lease on a per sack of marketable oysters basis and apply such estimates to the affected lease.
- d. The estimated annual net income from the lease for each full calendar year of the lease term remaining after the year of purchase, shall be discounted, at a rate intended to reflect the expected rate of return on investment in the Louisiana oyster industry or a similar industry with equivalent risk, to determine the present value of such income as of the first day of the calendar year following the year of purchase. The discount rate will be

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developed by an independent financial analyst in concurrence with the appraiser after researching the market and analyzing the individual oyster lease being evaluated. Where there is insufficient data in the market to derive a discount rate, published rates developed by independent financial analysts may be used.

- e. Information submitted by the leaseholder may include affidavits to explain or supplement other accruelements.

D. Estimate of fair market value of marketable and seed oysters not reasonably removable

The leaseholder may be allowed a sufficient reasonable period of time after the closing date in which to remove marketable and seed oysters from the affected lease, at his sole risk and expense, and no compensation shall be allowed for oysters so removable. However, if such period of time is not allowed, the appraiser shall estimate the fair market value of the marketable and seed oysters not reasonably removable by the leaseholder after the closing date and before the date the leaseholder is required to vacate the lease, and the just compensation paid to the leaseholder shall be increased by the amount of such fair market value.

E. In making the appraisal, the appraiser may rely on information given by an oyster biologist selected by the secretary to assist the appraiser.

F. At least 90 days prior to the closing date, the leaseholder of an affected lease shall be notified in writing of the proposed just compensation to be paid for the affected lease, and the basis thereof. The leaseholder may submit to the secretary, within 30 days of receipt of the notice, in writing, any information believed to warrant an increase in the amount of just compensation offered. The secretary may, on the basis of all information available, thereafter modify or affirm the original offer. An offer may be withdrawn at any time prior to closing.

§880. Purchase Agreement and Release

In consideration for payment of just compensation for an affected lease, the leaseholder and any person holding a property interest in an affected lease shall execute a purchase agreement with the State of Louisiana and a receipt, release, indemnity and hold harmless agreement in favor of the United States of America, including the U.S. Army Corps of Engineers, and the lead agency, and the State of Louisiana, including the Louisiana Department of Natural Resources and the Louisiana Department of Wildlife and Fisheries, indicating that full and fair compensation has been made in complete satisfaction of all claims against the State and the United States of America, related to past, present or future damages to the affected lease, and related losses and expenses, including all claims in tort, contract, or inverse condemnation and/or under any other applicable theory of recovery, including, but not limited to, 28 U.S.C. §1497.

§881. Funding

The Department shall have no duty to implement oyster lease acquisitions for any coastal restoration project in the absence of appropriate funding arrangements.